

## § 212.05

(2) The sole owner of an unincorporated business who has a net worth of not more than \$5 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1144j(a)) with not more than 500 employees; and

(5) Any other partnership, corporation, association, or public or private organization with a net worth of not more than \$5 million and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the adversary adjudication was initiated.

(d) An applicant who owns an unincorporated business will be considered to be an "individual" rather than a "sole owner of an unincorporated business" if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the presiding officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the presiding officer may determine that financial relationships of the

## 19 CFR Ch. II (4-1-08 Edition)

applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

### § 212.05 Standards for awards.

(a) The determination whether an applicant is a prevailing party shall be made on a case-by-case basis.

(b) A prevailing applicant may receive an award for fees and expenses incurred in connection with an adversary adjudication, or in a significant and discrete substantive portion of the adversary adjudication, unless the position of the Commission investigative attorney was substantially justified. The burden of proof that an award should not be made to an eligible prevailing applicant is on the Commission investigative attorney. An award may be avoided by showing that the position of the Commission was reasonable in law and fact.

(c) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the adversary adjudication or if special circumstances make the award sought unjust. The burden of proof that an award should be reduced or denied for either of these reasons is on the Commission investigative attorney.

### § 212.06 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b) No award for the fee of an attorney or agent under these rules may exceed \$75.00 per hour. No award to compensate an expert witness may exceed the highest rate at which the Commission pays expert witnesses. However, an award may include the reasonable expenses of the attorney, agent, or expert witness as a separate item if the attorney, agent or expert witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the presiding officer shall consider the following:

(1) If the attorney, agent or expert witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the service;

(2) The prevailing rate for similar services in the community in which the attorney, agent or expert witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the adversary adjudication; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded to the extent that the charge for the service does not exceed the prevailing rate for similar services and the study or other matter was necessary for preparation of the applicant's case.

#### **§ 212.07 Rulemaking on maximum rates for attorney fees.**

(a) If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), the Commission may adopt regulations providing that attorney fees may be awarded at a rate higher than \$75 per hour in the proceedings covered by this part. The Commission will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act.

(b) Any person may file with the Commission a petition for rulemaking to increase the maximum rate for attorney fees. The petition should identify the rate the petitioner believes the Commission should establish. It should also explain fully the reasons why the higher rate is warranted. The Commission will respond to the petition within 60 days after it is filed by initiating a rulemaking proceeding, denying the

petition, or taking other appropriate action.

### **Subpart B—Information Required From Applicants**

#### **§ 212.10 Contents of application.**

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the adversary adjudication for which an award is sought. The application shall show that the applicant has prevailed and identify the position of the Commission investigative attorney that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(b) The application shall also include a statement that the applicant's net worth does not exceed \$1 million (if an individual) or \$5 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) The application shall state the amount of fees and expenses for which an award is sought.

(d) The application may also include any other matters that the applicant wishes the Commission to consider in determining whether and in what amount an award should be made.

(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under oath or